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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2017, *et al.*,
Petitioners,

v.

CASPAR WEINBERGER, Secretary of Defense, *et al.*, and PAN AMERICAN WORLD AIRWAYS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF OF PETITIONERS

For the reasons which follow, petitioners American Federation of Government Employees, Local 2017, et al., submit that the Federal respondents (hereinafter "the Government") and Pan American World Airways, Inc. (hereinafter "Pan Am") have failed to provide rationale for denying the petition for certiorari.[1]

Pan Am makes the egregious suggestion that the district court found as a matter of fact that contracting out of the services formerly performed by Federal work-

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[1] References to the Government's memorandum in opposition will be made in the form "Government Opp. at ——." References to Pan Am's brief in opposition will be made in the form "Pan Am Opp. at ——." References to petitioners' appendices to the petition will be made as "Pet. App. at ——."

ers to a private contractor was cheaper. Pan Am Opp. at 2-3. However, the district court dismissed the complaint without ever hearing any evidence. The excerpt of the court of appeals opinion cited by Pan Am merely recounts what the Army's cost study asserted.[2] Petitioners in their complaint challenged the accuracy of the Army's cost study so that whether it was in fact cheaper to contract out is a matter of dispute.[3]

Pan Am also wrongly implies that Section 806 did not create requirements on a decision to contract out. Pan Am Opp. at 3. Section 806(a)(1) prohibits contracting out to circumvent personnel ceilings and Section 806(a)(2)(A) requires a cost study prior to contracting out in which an estimate of the costs of in-house performance is based upon the most efficient and cost-effective organization. Whether these provisions are deemed "procedural" or "substantive" requirements, the compliance with both Section 806(a)(1) and Section 806(a)(2)(A) was in dispute.[4] Thus, the Government's compliance with the mandates of Section 806 was squarely before the lower courts.[5]

The respondents' analysis of the language in *Citizens to Preserve Overton Park v. Volpe*[6] is faulty and leads to erroneous conclusions.[7] For example, Pan Am asserts

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[2] 680 F.2d at 724-25; Pet. App. at 4a.

[3] Pet. App. at 26a-27a, 14-17.

[4] To the extent Pan Am characterizes these requirements as "procedural", it must still be recognized that petitioners challenged the accuracy of the cost study based on an inflated in-house estimate, and as prompted by personnel ceilings. It cannot be said therefore that compliance with "procedural" requirements was conceded. See note 3, *supra*.

[5] Significantly, the Government in its opposition does not raise this specious argument.

[6] 401 U.S. 402 (1971).

[7] Pan Am Opp. at 5; Government Opp. at 5.

that the Court in *Citizens to Preserve Overton Park* did not hold that a court is precluded from focusing on considerations apart from the statutory language. (Pan Am Opp. at 5). However, this assertion ignores what the Court stated in *Citizens to Preserve Overton Park*—*i.e.*, that 5 U.S.C. § 701(a)(2) is "*only applicable* in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"[8] Since the focus is on the language of the statute at issue, it therefore follows that the terms of the statute, rather than the nature of the agency decision is the focus of the inquiry.[9]

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[8] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 410, citing S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). Contrary to Pan Am Opp. at 5, n.6, this Court has not indicated for 5 U.S.C. § 701(a)(2) purposes that criteria beyond the language of the statute are relevant. In *Southern R. Co. v. Seaboard Milling Corp.*, 442 U.S. 444, 456-57 (1979), the discussion of the practical effects of reviewability went not to standards but to whether Congress intended to preclude review, a 5 U.S.C. §§ 701(a)(1) issue. Both *Barlow v. Collins*, 397 U.S. 159 (1970) and *Schilling v. Rogers*, 363 U.S. 666 (1960) predate *Citizens to Preserve Overton Park*. Additionally, *Barlow* concerned the 5 U.S.C. § 701(a)(1) review preclusion and was in terms of statutory construction, 397 U.S. at 166. *Schilling* concerned 5 U.S.C. § 701(a)(2) but based nonreviewability on the absence of statutory mandates on the point in dispute. 363 U.S. at 674-75.

[9] In response to Pan Am's assertion that the court of appeals looked at the nature of the agency decision as well as the statutory language (Pan Am Opp. at 4-5), petitioners submit that is precisely the point which petitioners submitted in their petition. Pet. at 6-7. While the statutory language was part of the "nature of the agency decision", the court of appeals relied on visceral concerns that were unrelated to the statutory language. It is the overexpansive reading of the 5 U.S.C. § 701(a)(2) exception to judicial review that caused the court of appeals to err in precluding review.

Also, contrary to the suggestion in Pan Am Opp. at 6, n.7, Professor Davis was not discussing judicial review of agency administrative actions when he discussed *Natural Resources Defense*

Both Pan Am and the Government also reference earlier decisions under Office of Management and Budget (OMB) Circular A-76, 44 Fed. Reg. 20556 (1979), revised 45 Fed. Reg. 69 322 (1980), as a basis for the court of appeals decision.[10] In this regard Pan Am wrongly states that OMB Circular A-76 contains more detailed guidelines than Section 806.[11] Yet the cases relied upon do not stand for this proposition simply because OMB Circular A-76 did not create *any* legally cognizable standard.[12] Thus, for *Citizens To Preserve Overton Park* purposes. OMB Circular A-76 did not create "law to apply." In fact, the reason for the enactment of Section 806 was to elevate provisions of OMB Circular A-76 to the "status of law." [13]

Merely an examination of the practical effect of Pan Am's and the Government's reliance on the OMB Circular A-76 cases demonstrate the absence of basis for the Respondent's reliance. Both respondents have used these cases as a means of suggesting that the decision to contract out, whether under OMB Circular A-76 or Section 806, is the appropriate focus rather than analyzing

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Council, Inc. v. SEC, 606 F.2d 1031, 1043-44 (D.D. Cir. 1979). Instead, Professor Davis was discussing an agency's discretion not to adopt rules after rulemaking proceedings. See Davis, *Administrative Law Treatise*, § 28.16-1, 512-13 (1982 Supp.).

[10] Pan Am Opp. at 7; Government Opp. at 3.

[11] *Id.*

[12] *Local 2855, AFGE v. United States*, 602 F.2d 574, 582, n.28 (3rd Cir. 1979), *AFGE Local 1872 v. Stetson*, 86 Lab. Cas. (CCH) ¶ 33,819 at 48, 851 (D.D.C. 1979). In *Local 2855*, the court specified that 5 U.S.C. § 701(a)(2) did not preclude review where charges are made that a decision violates statutory command. 602 F.2d at 580. Petitioners made precisely that allegation here.

[13] 125 CONG. REC. H7913 (daily ed. Sept. 14, 1979) (statement of Rep. Harris). Pan Am concedes that OMB Circular A-76 guidelines were elevated to the status of law by Section 806. Pan Am Opp. at 1.

the standard of Section 806. However, this would mean that even if Congress enacted legislation with the most finite standards and the most explicitly stated desire for judicial review, a court may still decline review because of the nature of the agency decision. Such an analysis would stretch section 701(a)(2) far beyond its intended limited applicability.

Pan Am disingenuously suggests that the court of appeals decision is supported, though not addressed by the court of appeals, by the absence of a judicial review provision in either section 806 or successor legislation.[14] This argument was specifically raised by the respondents before the court of appeals as an alleged basis for preclusion of review under 5 U.S.C. § 701(a)(1) (1976).[15] Based upon the briefs and arguments presented, the court of appeals expressly rejected the argument Pan Am raises here.[16] The Government raises a matter of stand-

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[14] Pan Am Opp. at 8.

[15] Specifically, 5 U.S.C. § 701(a)(1) provides:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review

[16] Pet. App. at 6a; *AFGE Local 2017 v. Brown*, 680 F.2d 722, 725 (11th Cir. 1982), citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1976). See Pet. App. at 6a, n.11. The United States District Court for the District of Rhode Island in *International Association of Firefighters (IAFF), Local F-100 v. Department of the Navy*, 536 F. Supp. 1254 (D.R.I. 1982) reached the same decision as the court of appeals did in analyzing the successor legislation to Section 806. 536 F. Supp. at 1265. See also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946). These decisions are fully consistent with the intent of Section 806 to elevate provisions of OMB Circular A-76 to the status of law. See note 13, *supra*. Finally, even the presence of language which appears to bar judicial review (a situation more extreme than the present since both Section 806 and its successor legislation have no express language suggesting judicial review is barred) may not preclude judicial review. *Heikkila v. Barber*, 345 U.S. 229, 233 (1953); *Breen v. Selective Service System*, 396 U.S. 460 (1970).

ing that is equally nongermane to the instant petition.[17] The court of appeals did not rule on the standing matter and this Court has previously held that without a lower court opinion on the legal issue, the Court will normally decline to consider a legal claim.[18] Nevertheless, a reading of the language of Section 806 and its legislative history indicate that petitioners are within the zone of interest of the statute.[19]

Finally, Pan Am erroneously suggests that the issue in this case is "neither novel nor particularly difficult."[20] However, this is the first action brought under legislation designed to eliminate the enforcement problems found under OMB Circular A-76.[21] Pan Am's argument ignores that Congress was responding to those very cases upon which Pan Am relies. Thus, the circumstances of

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[17] Government Opp. at 6-7.

[18] *National Labor Relations Board v. Sears Roebuck & Co.*, 421 U.S. 132, 164 (1975).

[19] For example, specific references to Federal employees in the language of Section 806 may be found in the introductory language of Section 806(a) ("no . . . function . . . being performed by *Department of Defense personnel* may be converted"), in the requirement of a cost comparison under Section 806(a)(2)(A), and in the requirement made of the Secretary of Defense under Section 806(a)(2)(B)(i) to compile a report on the economic effect on employees if more than fifty jobs are contracted out. These statutory provisions demonstrate a concern for the protection of Federal employees where wasteful contracting out occurs and/or where many employees are affected. Further concern for Federal workers is evident in the legislative history. See, e.g., 125 CONG. REC. H7913 (daily ed. September 14, 1979) (statement of Congressman Kazen). Significantly, the court in *IAFF, Local F-100 v. Department of the Navy, supra*, found that Congress chose not to deny standing explicitly in the successor legislation to Section 806. 536 F. Supp. at 1265.

[20] Pan Am Opp. 8-9.

[21] 125 CONG. REC. H7913 (daily ed. September 14, 1979) (statement of Rep. Harris).

the present case are far different from the cases relied upon by Pan Am in asserting that the issue is "neither novel or difficult." [22]

On the basis of the petition for certiorari and this reply brief, the petition for certiorari should be granted.

Respectfully submitted,

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[22] The Government concedes the existence of new legislation but offers a misreading of Section 502(a) of the Department of Defense Authorization Act, 1981, Pub. L. No. 96-342, 94 Stat. 1086, 10 U.S.C. (Supp. V) § 2304 note. See Government Opp. at 7, n.5. In fact, Section 502(a) applies to any potential contracting out of Federal work in the Department of Defense after October 1, 1980.